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High noon for cashed-up cowboys of class actions

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Wednesday may mark the beginning of the end for the predator's picnic that is Australia's litigation funding industry. If all goes to plan, the Morrison government will ask the Parliamentary Joint Committee on Corporations and Financial Services to take a close look at Australia's escalating class action industry, examining especially the role of litigation funders and lawyers' contingency fees.

The inquiry is so overdue it's not funny. When a new asset class provides returns on invested capital of 390 per cent, and an internal rate of return of 624 per cent, that ought to be a big fat clue that something is awry.

Welcome to Australia's litigation funding industry, where Omni Bridgeway, formerly IMF Bentham, confessed to these astronomical returns in the Murray Goulburn class action in its public filings. And that was after the court slapped down the funder's expected return of 562 per cent.

From being a rarity less than 10 years ago, litigation funders now finance three-quarters of all class actions in Australia. And the plundering of plaintiffs is attracting foreign capital. Global hedge funds, even Harvard's endowment funds, are piling into Australian-based litigation funds.

The committee might notice the inverse correlation between the riches showered on funders and the returns to the victims who were supposed to benefit from the enhanced "access to justice" that litigation funding was supposed to offer. In its 2017 submission to the Victorian Law Reform Commission, the National Union of Workers highlighted a class action for unpaid redundancies owed to its members. They were awarded $5,107, 259 by the Supreme Court. The entire award went to pay the fees of the funders, lawyers and accountants.

The Australian Law Reform Commission has found class actions involving litigation funders result in an average return to class members of just 51 per cent after commissions and fees. By contrast, the average return to class members of legal actions without litigation funding is 85 per cent.

Promises about offering plaintiffs greater access to justice have become a smokescreen for ripping them off.

As The Weekend Australian reported on Saturday, the Department of Defence settled three class actions arising from leaks of PFAS, a toxic firefighting chemical, from its bases into local aquifers and land.

Of the $212.5m settlement, the lawyers took $30m and Omni Bridgeway raked in $51.5m. One group of plaintiffs, the people of Oakey, whose lawyers had once predicted a $200m pay-off, received only $16.4m to be shared between 450 people — about $36,000 each on average. Many of those plaintiffs had no say in agreeing to this pathetic deal.

That access to justice has become a licence to gouge innocent consumers while tipping untold riches into the pockets of litigation funders is not the only baleful consequence of Australia's descent into a hellish class action free-for-all.

The torrent of funded continuous disclosure claims has caused an insurance strike among D&O insurers, focusing company directors on self-defence rather than growing productivity, creating jobs and wealth. Eventually more companies will simply delist or move offshore to avoid the avarice of roaming litigation funders.

Five key ingredients have turned Australia's class action system into a predator's picnic for litigation funders.

First, there are ridiculously low thresholds to launching a funded class action: law firms and litigation funders need find only one lead plaintiff and believe there are seven more.

Next, litigation funders can magnify the class to include anyone answering a generic description, boosting the settlement figure and thus the funder's take. Best of all, the class members need not have seen the funding agreement, let alone consented to it.

In any other industry, regulators and politicians would scream blue murder about such a dodgy system. So would a royal commissioner with a remit to investigate the financial services industry.

And that raises the third reason Australia is the destination of choice for foreign-backed litigation funders. They can roam free, happily unencumbered by laws, duties and regulations that apply to all other providers of financial services.

Plaintiffs can thank a guileless Labor government for falling for all the guff about litigation funders providing greater access to justice without realising that removing regulation would unleash a new class of predators on to both plaintiffs and defendants.

In 2009 the Full Federal Court in the Multiplex case decided that litigation funders were offering a "managed investment scheme". Normally that attracts a serious regulatory regime to protect consumers. But when finance minister Chris Bowen granted litigation funders a neat exemption, their already booming business model went gangbusters.

Indeed, Labor governments, federally and in Victoria, have shown a remarkable tenderness towards the interests of litigation funders and law firms that benefit from them. Chief among them, Bill Shorten's alma mater Maurice Blackburn, the Melbourne law firm that has the biggest slice of class actions in Australia, 17.9 per cent; and Slater & Gordon, whose former partners include Julia Gillard, which comes second.

The cosy links between these blue-blood Labor law firms and ALP governments, not to mention the generous donations the law firms have made to the ALP, deserve close scrutiny when asking how we ended up being a paradise for funders and their law firms at the expense of plaintiffs.

The fourth key ingredient is the fact litigation funders face few risks. It's not as if they need big returns to justify taking on losing cases. Omni Bridgeway bragged to investors in March about an 89 per cent success rate while Litigation Lending Services has a 94 per cent success rate.

The final ingredient in the predator's picnic is ridiculously high returns. While not every case wins Omni Bridgeway a 390 per cent return, it reported to investors in its March 31 update that its cumulative return is 134 per cent. Nice work if you can get it.

There is a real opportunity for the parliamentary joint committee to clean up the gorging by the growing number of litigation funders in this country. It can start by getting rid of funding arrangements and orders that allow litigation funders to co-opt class members into agreements they knew nothing about, in favour of a more honest "opt-in" system. It should consider imposing a duty on funders to act in the best interests of class members, just as other providers of financial services owe their clients. And why not a prohibition on aggregate funding and legal costs from exceeding a reasonable percentage of any award? As for lawyers licking their lips, trying to secure

contingency fees so they can muscle in on the action? The parliamentary committee should tell them they're dreaming if they think that blatant conflict of interest is on the cards.

After all, somebody somewhere should finally put the interests of justice for plaintiffs ahead of a law firm's burgeoning bank balance and a litigation funder's juicy rates of returns.

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